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Supreme Court, U.S.
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No. 02-531

IN THE
Supreme Court of the United States

OKANOGAN SCHOOL DISTRICT NO. 105, et al.,
Petitioners,

v.

DR. TERRY BERGESON, in her official capacity as Superintendent of Public Instruction of the State of Washington; and MICHAEL J. MURPHY, in his official capacity as the Treasurer of the State of Washington,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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REPLY BRIEF FOR PETITIONERS

None of the arguments that Respondents (hereafter "the State") offer in opposition to certiorari gives reason to deny review of the important constitutional issues presented here.

I. Review is Warranted to Resolve the Circuit Conflict Over Whether Political Subdivisions Have Standing to Bring Pre-emption Claims Against State Officials.

Neither of the State's arguments for delaying resolution of the circuit split regarding political subdivision standing has merit.

First, contrary to the State's suggestion (Opp. at 15), the Ninth Circuit does have a "per se rule" prohibiting political subdivisions from bringing pre-emption claims, and it applied that rule here. Prior to this case, the Ninth Circuit twice characterized its decision in *City of South Lake Tahoe v. California Tahoe Reg'l Planning Agency,* 625 F.2d 231 (9th Cir. 1980), as establishing a "broad, per se rule" that "foreclose[s] the possibility" of allowing any political subdivision to bring a pre-emption claim. *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank,* 136 F.3d 1360, 1362, 1364 (9th Cir. 1998); *accord Pomerado Health Sys. v. Belshe*, 180 F.3d 1104, 1107 (9th Cir. 1999); *id.* at 1108-10 (Hawkins, J., concurring) (circuit has "per se rule"). The panel here thus held that "*South Lake Tahoe* controls" simply because "[s]chool districts are a political subdivision of the state, and political subdivisions of a state may not challenge the validity of a state statute in federal court." App 3a, 9a.

Nor is there any doubt that School Districts would have standing in all other courts to consider this issue. Those courts have held that political subdivisions may bring pre-emption claims if (i) they have sufficient autonomy under

state law and (ii) they satisfy traditional Article III criteria. *See, e.g., Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628-30 (10th Cir. 1998); *Allegheny County Sanitary Auth. v. EPA*, 732 F.2d 1167, 1173 n.3 (3rd Cir. 1984)[1]; *Rogers v. Brockette*, 588 F.2d 1057, 1065-66 (5th Cir. 1979); *United States v. Alabama*, 791 F.2d 1450, 1455 (11th Cir. 1986) (adopting *Rogers*); *City of Bristol v. Earley*, 145 F. Supp. 2d 741, 744-45 (W.D. Va. 2001). Neither the State nor the courts below has ever disputed that the School Districts are substantially independent entities under Washington law. *See* Pet. at 17-18. Nor have they ever suggested that the Districts fail to satisfy any of the traditional Article III standing criteria. Each of the Districts claims the State is depriving it of tens of thousands of dollars each year by obstructing the federal directives that forest aid be used to *benefit* impacted schools by *supplementing* other available state educational funds. *See* Pet. at 25-29. The Districts' injury is caused by the operation of Wash. Rev. Code §28A.520.020(3), which subtracts the exact amount of federal forest aid that they receive from their otherwise available basic education allowance. If this Court finds §28A.520.020(3) pre-empted, the State will have to start giving the Districts' their full basic education allowance, without offsetting it against their federal forest aid. Under any conventional application of Article III principles, the Districts have standing. Their case stands or falls with the correctness of the Ninth Circuit's per se bar against political subdivisions brining pre-emption cases in federal court.

Second, contrary to the State's suggestion (Opp. at 17-18), there is no reason to delay resolving this circuit split for federalism reasons. Other than kicking up dust on the subject, in fact, the State never makes any argument as to how this Court's recent Tenth and Eleventh Amendment decisions

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[1] Petitioners overlooked this Third Circuit decision in researching the Petition for a Writ of Certiorari. We regret our oversight.

might apply here – much less as to why those decisions pertain to Article III standing. In any event, finding standing here poses no Tenth Amendment problem because allowing political subdivisions to bring pre-emption claims in federal court does not force any state official to do anything. Bringing such cases is purely voluntary, and local officers may "take an active role in the implementation of federal law" if they do so "without a congressional directive that they implement it." *Printz v. United States,* 521 U.S. 898, 913 (1997); *see also* Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control,* 97 Mich. L. Rev. 1201, 1210-15, 1248 (1999) (discussing this standing issue and finding no commandeering). Nor does finding standing here implicate the Eleventh Amendment, for this is a suit for prospective relief against state officials. *See Ex Parte Young,* 209 U.S. 123 (1908).

Further, even if lawsuits brought by political subdivisions theoretically could raise federalism concerns, no such concerns are present here or in the other cases that have generated the conflict on this issue, for federal aid programs are enacted pursuant to Congress's core Spending Clause authority. "[A] perceived Tenth Amendment limitation on congressional regulation of state affairs [does] not concomitantly limit the range of conditions legitimately placed on federal grants." *South Dakota v. Dole,* 483 U.S. 203, 210 (1987); *see also New York v. United States,* 505 U.S. 144, 173 (1992); *Oklahoma v. United States Civil Serv. Comm'n,* 330 U.S. 127, 143 (1947) (Congress has "power to fix the terms upon which its money allotments to [a] state shall be disbursed"). If states do not like the terms of a federal program, they can simply "decline [the] federal grant." *New York,* 505 U.S. at 168.

The absence of federalism impediments to lawsuits such as this is so patent that neither of the two courts to find

political subdivision standing since this Court's decisions in *Printz*, *New York*, and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), have found it necessary even to reference the subject. *See Branson Sch. Dist*, 161 F.3d at 628-30; *Earley*, 145 F. Supp. 2d at 744-45. Nor did the Ninth Circuit here mention the issue, despite Petitioners' briefing to it on the point.

Finally, even if a serious argument could be made that the issue of political subdivision standing actually carries federalism implications, the issue is too pressing for this Court to leave this circuit split unresolved. Not only is this standing question crucial in federal education funding cases such as this one, *Rogers*, 588 F.2d at 1066-65, and *Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 v. Kirk*, 91 F.3d 1240 (9th Cir. 1996), *vacated and appeal dismissed*, 139 F.3d 634 (9th Cir. 1997), but the issue also arises in pre-emption cases involving the Medicaid Act, *Belshe*, 180 F.3d at 1107; the Telecommunications Act of 1996, *Earley*, 145 F. Supp. 2d at 744-45; federal aviation safety rules, *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d at 1362; environmental land use regulations, *South Lake Tahoe*, 625 F.2d at 233; federal regulation of water rights, *Rural Water Dist. No. 1 v. City of Wilson*, 243 F.3d 1263, 1274 (10th Cir. 2001); the Water Pollution Control Act, *City of S. Portland v. State*, 476 A.2d 690, 698-99 (Me. 1984); and federally donated lands held in trust, *Lassen v. Arizona*, 385 U.S. 458, 459 & n.1 (1967); *Branson Sch. Dist.*, 161 F.3d at 628-29. In light of the recurring importance of this issue, this Court should not delay its resolution any longer.

II. The Ninth Circuit's Treatment of the Students' Standing Warrants This Court's Review.

The students' standing is critical because if this Court holds that political subdivisions lack standing to bring pre-emption claims, then these individuals will be the only

potential plaintiffs who could enforce the disbursement conditions on federal grants such as this one. Equally important, the Ninth Circuit's treatment of this issue and the State's position on it contravene basic Article III principles.

A. The Ninth Circuit's Decision Conflicts with *Steel Co.*

The State's assertion that "[i]t was permissible for the [Ninth Circuit] to avoid th[e] difficult question" of whether the students have standing and "resolve the case on the merits in favor of the same party," Opp. at 13-14, fundamentally misapprehends this Court's decision in *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83 (1998). This Court held there in no uncertain terms that "[t]he requirement that jurisdiction be established as a threshold matter . . . is inflexible and without exception." *Id.* at 94-95 (internal quotation and citation omitted). Indeed, the Ninth Circuit's decision here is all the more troubling because the *Steel Co.* opinion explicitly directed the Ninth Circuit to abandon its practice of "hypothetical jurisdiction," under which it would do precisely what it did here: leave standing issues unresolved when it preferred to decide cases on the merits instead. *Id.* at 94. This Court should not allow the Ninth Circuit to flout its rulings in this manner.

Even the State's contention (Opp. at 13) that two of the Justices who wrote separately in *Steel Co.* would condone the Ninth Circuit's merits-before-jurisdiction decision here is incorrect. Although those Justices would have permitted courts to avoid difficult standing questions in limited circumstances, they would have allowed such action only "assuming an easy answer on the substantive merits." *Id.* at 111 (Breyer, J., concurring in part and concurring in the judgment). The merits here involve the constitutionality of a state law that, at the very least, is in substantial tension with the Supremacy Clause. No Justice has ever suggested that a

federal court may resolve such a difficult constitutional issue before assuring itself it has jurisdiction to do so.

B. The Ninth Circuit's Decision Creates a Conflict in the Lower Courts.

The State contends the Ninth Circuit's refusal to grant standing to the students does not conflict with *Gwinn Area Community Schs. v. Michigan*, 741 F.2d 840 (6th Cir. 1984), and *Shepheard v. Goodwin*, 280 F. Supp. 869 (E.D. Va. 1968) (three-judge court), because those cases did not involve the federal forest aid program. Opp. at 14. But this assertion, once again, misapprehends basic Article III standing principles. Standing does not necessarily turn on the precise substantive statute involved in a case. It turns instead on injury, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The State does not contest that the Student Petitioners are suffering the same kind of injury (educational harm); caused by the same kind of law (one that treats federal aid dollars as a substitute for otherwise available state education dollars); that is redressable in the same way (requiring the State to treat the federal money as a "supplement" to that otherwise available aid) as the student-plaintiffs in *Gwinn* and *Shepheard*. *See* Pet. at 20-22 (explaining equivalence of standing issues in these cases). Accordingly, in every meaningful sense, the Ninth Circuit's decision conflicts with those decisions.

III. This Court Should Determine Whether States May Use Federal Forest Funds as a Substitute, Instead of a Supplemnent, for Funds It Otherwise Makes Available To Public Schools.

The State's defense of the Ninth Circuit's holding on the merits is ineffective, and its suggestion that this issue is not important is incorrect.

A. The Ninth Circuit Erred in Holding That the Federal Forest Payments Program Does Not Pre-empt the State's Offsetting Statute.

The pre-emption question here is whether the State's offsetting statute, Wash. Rev. Code §28A.520.020(3), "conflicts with federal law or stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 260 (1985) (internal quotation omitted). This Court's decision in *King County v. Seattle Sch. Dist. No. 1*, 263 U.S. 361 (1923), says nothing whatsoever about this issue. That case involved the distinct issue of whether federal law restricts how States apportion their federal forest revenues *between* schools and roads. This Court held that States may apportion the aid however they wish, so long as it is used *"for the purposes stated"* in 16 U.S.C. §500 – that is, for schools and roads. *King County*, 263 U.S. at 364 (emphasis added); *see also id.* ("for the specified purposes"); *Eminence R-1 Sch. Dist. v. J.D. Hodge*, 635 S.W.2d 10, 11 (Mo. 1962) (funds must be used for schools and roads). But here, the State, by using 50% of its forest funds as a substitute for otherwise available state education dollars, is effectively treating that federal money as a windfall to use on any project it likes anywhere in the State. In other words, the State is not using this money to benefit schools *or* roads. The Ninth Circuit here, and the Washington Supreme Court in *Carroll v. Bruno*, 499 P.2d 876 (Wash. 1972), are only courts that have ever held that such a practice is not pre-empted.[2]

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[2] Contrary to the State's assertion, the Oklahoma Supreme Court in *State v. State Bd. of Educ.*, 293 P.2d 583 (Ok. 1956), did not address whether federal law pre-empted offsetting; it held only that offsetting was permitted by *state* law. Oklahoma has repealed the state statute at issue there, and it now appears to use federal forest aid as a supplement to other state funds. In *Goodin v. Board of Educ.*, 601 P.2d 88 (Ok. 1979), the Court considered a school district's claim that its location adjacent to a national forest made it eligible to receive federal forest funds. Bringing

The State's defense of these decisions, however, as consistent with the terms of the federal forest statutes (Opp. at 11) cannot withstand scrutiny. Section 500 directs States to use federal forest aid "for the benefit of public schools and public roads" in forest counties. This Court recently held that an entity receives a "benefit" from a federal program if it "derive[s] significant advantage" from it. *Fischer v. United States,* 529 U.S. 667, 678 (2000). Yet, under the State's offsetting regime, it is the State's general fisc, not impacted schools, that "derives significant advantage" from the federal forest aid that the State earmarks for education. The impacted schools end up not one penny better off as a result of the federal aid. By totally negating the benefit that federal forest aid is supposed to deliver to forest county schools, Wash. Rev. Code §28A.520.020(3), plainly obstructs federal law.

The Secure Rural Schools Act's provision stating that federal forest aid "supplements other available funds," §2(b)(1), confirms this analysis – and it is especially telling that the State never even attempts to explain how its offsetting law could possibly be consistent with this provision. At least the Ninth Circuit realized it was required to give some effect to that language. But, as Petitioners explained in their Petition for Certiorari at 27-28, the Ninth Circuit mistakenly concluded that the "supplement" phrase referred to a different federal aid program. Apparently realizing that the Ninth Circuit was wrong on this score, the State does not defend the court's reasoning.

Yet the State's approach of pretending that the phrase "supplements other available funds" does not exist is, if anything, worse than the Ninth Circuit's error. It is an "elementary canon of construction that a statute should be

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such a lawsuit in Washington would be nonsensical because it would not affect the total amount of money a school district would receive.

interpreted so as not to render one part inoperative." *Colautti v. Franklin,* 439 U.S. 379, 392 (1979). Once one gives effect to the "supplement" proviso, it is impossible to avoid the conclusion that the State's use of federal forest aid as a substitute for otherwise available state funds frustrates federal law.

Not only does the State ignore the most critical provision of the Secure Rural Schools Act, but, when it briefly mentions the Act, *see* Opp. at 11, the State offers a construction that drains the whole Act of any effect whatsoever. The indisputable purpose of the Act was to stabilize waning forest fund payments by giving localities a choice between receiving their customary 25% payment or an alternate, guaranteed minimum payment. Secure Rural Schools Act §§2(a)(9)-(10), 2(b)(1), & 102(a)-(b); Opp. at 11. But if States are allowed to use this federal aid as a substitute for otherwise available funds, then it makes no difference to local Washington communities whether they choose the 25% payment or the alternate amount. Their public schools will get the same amount regardless. This Court should refuse to condone such an illogical interpretation of the Act, which would transform it into a meaningless charade.

The State's final protestation – that the Secure Rural Schools Act did not "alter" the distribution rules contained in §500 (Opp. 11) – is legally irrelevant. Even if that subsequent Act did not expressly "amend" §500, this Court has explained that "a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended." *United States v. Estate of Romani,* 523 U.S. 517, 530-31 (1998). The Secure Rural Schools Act specifically provides that federal forest funds are intended to "supplement[] other available funds." §2(b)(1). That policy must control here.

B. This Issue Is of Vital Importance.

Finally, the State seeks to diminish the importance of this pre-emption issue by noting that Petitioner Okanogan School District is losing *only* about $100,000 per year. These, however, are critical dollars. Notwithstanding its appellation, the State's "basic education allowance" does not provide Okanogan with enough money to hire teachers and buy books. An extra hundred thousand dollars per year would allow the School District, for instance, to re-staff the three teaching positions it recently had to terminate, or to purchase hundreds of new textbooks each year.

More to the point, the State ignores the fact that Okanogan School District is only one of dozens of school districts in Washington and Oregon that are losing the vital federal aid that Congress intended them to receive. Washington received a total of $44 million in federal forest payments in 2001. Pet. App. 53a. Oregon, the other state with an offsetting law, received $155 million. *Id.* Together, this accounts for about 54% of the federal forest aid distributed nationally. This Court's guidance is essential to determine if this substantial portion of federal aid that serves "a high priority for this Administration," Pet App. 50a, is being used unlawfully.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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